Supreme Court, U.S.
FILED
JAN 8 1991
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 90-1061

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Cross-Petitioner,

v.

WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., TED KOZERA, MIKE HANLEY, CHRIS KULERS, MICHAEL CINELLI, FRANK HONAN and JAMES STEMMERMAN,

Cross-Respondents,

RESPONSE OF ORIGINAL PETITIONERS, KOZERA, ET AL., TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BURTON H. HALL
Attorney for Ted Kozera, et al., Cross-Respondents
401 Broadway
New York, N.Y. 10013

TABLE OF CONTENTS

	Page
Statute Involved	2
Statement of the Case	3
Summary of Argument	10
Argument:	
I. A labor union may be sued in federal courts by any or all of its members.	12
II. Kozera, et al., take no position on the question of third party duress raised by Local 501.	17
III. A labor union is liable for wrongful acts of its officers within the scope of their employment though not authorized by the union's executive board.	17
Conclusion	20

TABLE OF AUTHORITIES

Page

Cases

Aguirre v. Automotive Teamsters, 633 F.2d 168 (9th Cir. 1980) 12,14,18,19

Breininger v. Sheet Metal Workers, ___ U.S. ___, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989) 18,19

Gravenstein v. Local 879, 540 F.Supp. 7 (D.Alaska 1981) 15

Gravenstein v. Local 879, 96 FRD 137 (D. Alaska 1982) 16

Stolz v. United Brotherhood of Carpenters, Local 1971, 620 F.Supp. 396 (D.Nev. 1985) 16

United Mine Workers v. Coronado Coal Company, 259 U.S. 344 (1922) 12

United States v. White, 322 U.S. 694 (1944) 12

White v. Local 942, 90 FRD 368 (D.Alaska 1981), modified on other grounds, 688 F.2d 850 (9th Cir. 1982) 16

Statutes

	Pages
§ 301(b) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(b)	passim
§ 101(a)(3) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(3)	15

Rule

Rule 23, Federal Rules of Civil Procedure	16

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Cross-Petitioner,

v.

WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., TED KOZERA, MIKE HANLEY, CHRIS KULERS, MICHAEL CINELLI, FRANK HONAN and JAMES STEMMERMAN,

Cross-Respondents,

RESPONSE OF ORIGINAL PETITIONERS, KOZERA, ET AL., TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The plaintiffs below, cross-respondents here ("Kozera, et al."), have previously petitioned for certiorari.

Local 501, a defendant below, now cross-petitions. Kozera, et al. oppose its cross-petition on the first question

it presents, take no position on the second, and support it on the third.

Statute Involved

§ 301(b) of the Labor-Management Relations Act of 1947 (Taft-Hartley Act), 29 U.S.C. § 185(b), provides as follows:

> **(b) Responsibility for acts of agent -- Entity for purposes of suit -- Enforcement of money judgments.** Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

§ 301(e) of that statute, 29 U.S.C. § 185(e), provides as follows:

> **(e) Determination of question of agency.** For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such

other person responsible for his acts, the question of whether the specific acts were actually authorized or subsequently ratified shall not be controlling.

Statement of the Case

Local 501 entered into a collective bargaining agreement with the employers' association ("Chapter") in 1986 which provided for union control of all work in Local 501's jurisdiction, hiring though the union hall, a seven hour day, and wages at rates over $20 per hour. The agreement was for a three-year period, until the end of May 1989.

On or about May 18, 1987, an arbitral body ("CIR") rendered a purported award, directing Local 501 to execute supplemental agreements ("Residential Agreements") that by their terms would eliminate effective union control over work comprising a third to a half of the Local's jurisdiction and would, as to such work, permit

employers to hire off the street, impose an eight hour day, and reduce the wage rate to $12.75 per hour.

Local 501's officers and executive board knew when they received the CIR's award, or were soon informed by counsel, that the award exceeded the submission and could therefore be successfully challenged in court. Nevertheless, the President and Business Manager of Local 501 executed the Residential Agreements, delivered signed copies to Chapter, and submitted the originals to Local 501's parent international for approval, which approval placed them in effect.

While the agreements were still in the possession of the Local's Business Manager, a majority of the Local's executive board expressed the view that the new agreements should not be executed or, if they were, should not be forwarded to the

international union for approval. Nevertheless, the Business Manager sent them to the International Union for approval and effectuation. Local 501's executive board took no corrective or punitive action.

Local 501's officers did not inform the Local's membership of the substance of the Residential Agreements until after they had already signed them and forwarded them to the international union. And, contrary to the established custom and practice of Local 501, the officers did not submit the Residential Agreements to the membership for ratification.

At the July 1987 membership meeting, Ted Kozera, a member, submitted a petition signed by more than 100 members of Local 501, asking the officers and executive board to bring proceedings to have the CIR award declared void, and to invalidate the Residential Agreements.

Local 501's officers and executive board rejected the petition by letter to member Kozera. Their rejection gave no indication that Local 501 or its officers would ever take the action requested.

After rejecting the petition, Local 501's officers sent out to the members a letter signed by the Business Manager, stating that although the agreements were "abhorrent," the officers and executive board " had "accepted" them, had "decided not to go into court to try to vacate the CIR decision," and that the Local "would not dare go into court" to do so.

The Business Manager's letter added that "on further consideration" the officers had decided to "solicit your personal opinion." Therefore, enclosed with the letter was a return postcard.

There were no "ballots" distributed to the membership. The letter did not

suggest that the members' expression of "personal opinion" in their return postcards could or would lead to any action or decision by the Local or its officers.

Although the postcards returned by members overwhelmingly opposed the CIR award and the Residential Agreements, neither Local 501 nor its officers took any action to challenge either the award or the agreements until, in its Answer served substantially more than a month later, a cross-claim challenging them was included.

Six members of Local 501 (Kozera, et al.) brought this action to invalidate the CIR award and to nullify the Residential Agreements.

The district court, on motions for summary judgment, declared the CIR award void. Pet.Appx. 19a.[1] After trial, it

---

[1] "Pet.Appx." refers to the appendix to the original petition for certiorari filed by Kozera, et al. Similarly, "Pet." refers to that petition, and

found that the Residential Agreements were void and that their implementation by Chapter violated the bargaining agreement, because in fact Chapter knew that the Business Manager and President had no authority to execute them. Pet.Appx. 42a-43a. The district court found that the actions of the Business Manager and President violated the Local 501's duty of fair representation but dismissed the claims of Kozera, et al. for breach of that duty on the ground that those actions were "unauthorized." Pet.Appx. 45a. It also denied the motion of Kozera, et al. for class certification. Pet.Appx. 54a.

The court of appeals reversed, holding the Residential Agreements valid. Pet.Appx. 16a. It remanded the breach of duty issue but only as to Local 501's lia-

---

"Cross-Pet." to the Cross Petition of Local 501.

bility and, as to that, only as to the question whether Local 501 had in place "adequate safeguards" to protect members against such actions by the President and Business Manager. Pet.Appx. 17a.

The court of appeals reversed the district court's denial of class certification and remanded. Pet.Appx. 17a. On remand, Kozera, et al. moved again for certification. Their motion is still pending in the district court.

Kozera, et al. has petitioned, and Local 501 has cross-petitioned, for writs of certiorari to the court of appeals.

Summary of Argument

1. Congress has provided in § 301(b) of the Taft-Hartley Act that a labor union may be sued by its members "as an entity." That issue is therefore put to rest.

Nor is there any genuine issue as to whether <u>all</u> members of a union may sue

their union. The courts have uniformly held that, in a proper case, they may.

Nor is such a question presented by the present record. Local 501 is being sued by only six of its members. If certiorari were granted, the question whether all members should be permitted to sue their union would not be properly before the Court.

2. Kozera, et al. take no position on the issue of third-party duress posed by Local 501 as the second point of its Cross-Petition.

3. Under the principle of respondet superior, a labor union is liable for a breach of its duty of fair representation committed by its responsible officers within the scope of their employment.

This Court and the court of appeals for the Ninth Circuit have so held. By deciding to the contrary, the court below

has decided an issue in conflict with those holdings.

The question should be reviewed by this Court. Upon such review, the decision below should be reversed with direction to the district court to adjudge Local 501 liable for the breach.

Argument:

I.

A labor union may be sued in federal courts by any or all of its members.

In United Mine Workers v. Coronado Coal Company, 259 U.S. 344, 391 (1922), this Court rejected the arguments that Local 501, relying upon what it terms the "Hornbook law" of unincorporated associations (Cross-Pet. 15), advances here. The Court, noting that a modern labor organization is comparable to a corporation, see: Ibid, 259 U.S. at 385-389, held that labor unions have the same standing as

corporations to sue or be sued in federal courts. And see: United States v. White, 322 U.S. 694, 701-703 (1944).

And in § 301(b) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(b), Congress has definitively provided that a labor union may sue and be sued "as an entity," apart from and separate from its members. Cf. Aguirre v. Automotive Teamsters, 633 F.2d 168, 171-172 (9th Cir. 1980)

It is thus anachronistic at best for Local 501 to assert that the issue of a labor union's suability is a "novel" and "fundamental" one requiring further consideration by this Court.

Indeed, Local 501 concedes that giving labor unions the same standing as corporations "may have resolved this problem"

(Cross-Pet. 15-16)[2]: the very problem it presents for review.

Attempting to breathe life into this "problem," Local 501 argues that, while a labor union may be suable by some of its members, it ought not to be suable by all; else (it says) horrors will ensue. Cross-Pet. 20-22.

But Local 501's attempt falls upon two insurmountable obstacles.

One is that the record does not present such a question. Local 501 is being sued (presently, at least) by only six of its members, not by all of them.[3] Were certiorari granted, therefore, the question whether it can be sued by all (or by

---

[2] Local 501 has reference to state laws for incorporation of labor unions. But plainly if these "might have resolved th[e] problem," so does § 301(b).

[3] Although Kozera, et al. have moved for class certification, their motion is still pending in district court.

most of) its members would not be properly before the Court.

The other obstacle is that Congress did not distinguish between suit brought against a labor union by some of its members and suit brought by all of them. Patently, anyone damaged by a wrongful act may sue. And if all members are damaged by a wrong committed by the union, all may sue the union for damages.

Nor is there anything preposterous or unheard of in a union being sued by or on behalf of all its members.

It is well established that a union may breach its duty of fair representation by a wrongful act adversely affecting all its members equally. Cf., e.g.: Aguirre, supra, 633 F.2d at 174 (ballot box stuffing which deprived all members of a fair vote on ratification of a proposed bargaining agreement was actionable as a

breach of the union's duty of fair representation).

It is similarly well established that, where a union breaches its duty toward all members of a bargaining unit, it may be sued by any of them, or by all as a class; see: cases cited by Local 501 in footnote 3, at pages 20-21 of its cross-petition.

In suits under § 101(a)(3) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(3), courts customarily, subject to the requirements of Rule 23, Fed.R.Civ.P., certify as plaintiff class the class of all the members of the defendant union; see, e.g.: White v. Local 942, 90 FRD 368, 371 (D.Alaska 191), modified on other grounds, 688 F.2d 850 (9th Cir. 1982); Gravenstein v. Local 879 , 540 F.Supp. 7, 11 (D.Alaska 1981) and Ibid, 96 FRD 137 (1982); Stolz

v. United Brotherhood of Carpenters, Local 1971, 620 F.Supp. 396, 402-406 (D.Nev. 1985).

In none of these cases have any of the horrors portrayed by Local 501 as certain to ensue, ensued.

Nor is there any need to "delineate criteria" in regard to it, as Local 501 contends (Cross-Pet. 23-27). The district courts of the various circuits have handled it adequately, guided by the criteria set forth in Rule 23, Fed.R.Civ.P.

II.

Kozera, et al., take no position on the question of third party duress raised by Local 501. Cross-Pet. iii, 27-36.

III.

A labor union is liable for wrongful acts of its officers within the scope of their employment though not authorized by the union's executive board.

Kozera, et al. and Local 501 disagree on the question of a labor union's liability for the unauthorized acts of its responsible officers. But they agree that the question should be considered by this Court. See: Pet. i-ii, 24-33; Cross-Pet. iii-iv, 36-43.

Congress has directed that a union's liability for its officers' acts should be determined by the principle of respondeat superior, and that questions of authorization or ratification should not be controlling. See: Pet. 28-30 and § 301(b) and (e) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(b), (e).

This Court confronted such an issue in Breininger v. Sheet Metal Workers, ___ U.S. ___, 110 S.Ct. 424, 107 L.Ed.2d 388 (1989), where the business agents had, without authorization, discriminated against a member in job referrals. The Court held that the labor union was liable for breach of its duty of fair representation. See: Pet. 29.

The Ninth Circuit confronted the same issue in Aguirre, supra, 633 F.2d at 174, where the union's officers stuffed the ballot box in a ratification election. The Court held the labor union liable for breach of its duty of fair representation.

In each case, the breach was committed by union officers without authorization by the union's executive board.

Here, Local 501's Business Manager and President acted within the scope of their employment. The facts as found

below establish that, by their actions, the two officers breached the duty of fair representation. Pet.Appx. 45a, 16a.

Yet the holding below is that, unless an absence of "reasonable safeguards" can be shown, the union is not liable. Pet. Appx. 16a-17a.

The decision below is thus in conflict with the holdings in Breininger and Aguirre. The conflict should be resolved by this Court.

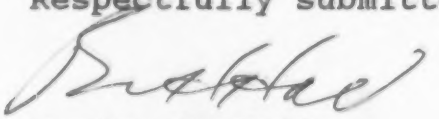
CONCLUSION

As to the question whether a union may be sued by its members, no writ should be granted.

As to the question of third-party duress, Kozera, et al. take no position.

A writ should issue on the question of a labor union's liability for wrongful though unauthorized actions of its responsible officers and, on review, the decision below should be reversed.

Respectfully submitted,



Burton H. Hall
401 Broadway
New York, N.Y. 10013
Attorney for Cross-Respondents, Ted Kozera, et al.

January 9, 1991